Supreme Court, U. S.
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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1976

No. 76-1483

TEAMSTERS LOCAL UNION 377,
Petitioner,

v.

WILLIAM SCOTT,
Respondent.

PETITION FOR A WRIT OF CERTIORARI

To the United States Court of Appeals
for the Sixth Circuit

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TEAMSTERS LOCAL UNION 377,
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v.

WILLIAM SCOTT,
Respondent.

PETITION FOR A WRIT OF CERTIORARI

To the United States Court of Appeals for the Sixth Circuit

Teamsters Local Union 377 petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Sixth Circuit entered in this cause on January 26, 1977.

OPINIONS BELOW

The opinion of the Court of Appeals (App., infra, pp. A-1–A-4) is not yet officially reported, but is unofficially reported at 94 LRRM 2505. The Judgment of the United States District Court, Northern District of Ohio, Eastern Division (App., infra, pp. A-5–A-10) was not reported.

JURISDICTION

The Judgment of the Court of Appeals (App., infra, pp. A-1 –A-4) was entered on January 26, 1977. The jurisdiction of this Court is invoked under 28 U.S.C. Section 1254(1).

QUESTIONS PRESENTED

1. Whether a prevailing plaintiff in a Section 301 suit for breach of a union's duty of fair representation is entitled as a matter of right to include in his damages against the union his attorney's fees.

2. Whether the standards for determining entitlement to an award of attorney's fees enunciated by the Supreme Court in *Alyeska Pipeline Service v. Wilderness Society*, 421 U.S. 240, are applicable in a suit for breach of a union's duty of fair representation in an action under Section 301 of the LMRA.

STATUTES INVOLVED

Section 301 of the Labor Management Relations Act, 29 U.S.C. Section 185, is set forth at App., infra, p. A-11.

STATEMENT OF THE CASE

Plaintiff William Scott instituted this action under Section 301 of the Labor Management Relations Act, 29 U.S.C. Section 185, joining as Defendants Anchor Motor Freight, Inc., and Teamsters Local Union 377. Plaintiff alleged that his employer, Defendant Anchor Motor Freight, Inc., had, without proper cause and in violation of its agreement with Defendant Union, wrongfully discharged him. Plaintiff further claimed that his collective bargaining representative, Defendant Teamsters Local Union 377, breached its duty of fair representation in failing to process a grievance protesting the improper discharge. Plaintiff's Complaint, in separate counts, sought damages from Defendant Anchor Motor Freight for the alleged wrongful discharge, and from Defendant Union for the alleged breach of its duty to properly represent Plaintiff in processing his grievance. No allegation or contention was made that the Union participated in or was in any way responsible for the wrongful discharge.

The case was tried to a jury. A verdict was returned in favor of Plaintiff against both Defendants. The jury found that Plaintiff was wrongfully discharged by Defendant Company, and assessed damages against the Company in the sum of $12,500.00. The jury further found that Defendant Union failed to provide Plaintiff with fair representation and assessed damages against Defendant Union in the same amount, $12,500.00. Judgment was entered, accordingly, by the trial court.

After return of the jury's verdict, Plaintiff filed a Motion for an Award of Attorney Fees. The trial court, ruling that the verdict against the Union adequately compensated Plaintiff for the difficulty and expense of collecting from Defendant employer, concluded "that a further award of attorney fees would be inappropriate."

The Defendant Company and Defendant Union, in separate appeals, appealed to the United States Court of Appeals for the Sixth Circuit. Plaintiff Scott appealed from the trial court's refusal to award him attorney fees.

The Appellate Court, in a pre-*Alyeska Pipeline Service Company v. Wilderness Society*, 421 U.S. 240 (1975) decision, upheld the judgment against the Company and the jury's finding of Defendant Union's liability, but ruled that the jury's verdict of damages against Defendant Union, having been made in the complete absence of evidence concerning attor-

ney's fees, was speculative and could not stand. The Judgment against the Union was vacated and the cause remanded to the District Court with instructions "for a comprehensive determination of damages incurred by Scott [Plaintiff] as a result of the Union's breach of its duty of fair representation." 496 F.2d 276, 282 (6th Cir. 1974)

Defendant Teamsters Local 377, seeking to challenge the Appellate Court's order for an award of attorney's fees, filed a Petition for Certiorari with this Court. The Petition was denied. 419 U.S. 997 (1974)

After denial of the Petition for Certiorari, the District Court scheduled the case for hearing on the sole issue of damages sustained by Plaintiff Scott as a result of the Union's breach of duty. Plaintiff sought compensatory damages, and on the ground that the Union was guilty of bad faith, demanded punitive damages and attorney's fees. A trial de novo on the limited issue of the Union's responsibility for damages claimed by Plaintiff was held. The trial court found (1) that the sum of $12,500.00, the amount previously awarded by the jury in a prior hearing, was a just figure to compensate Plaintiff for the breach of Local 377's duty of fair representation; (2) that Plaintiff was entitled additionally to $1,000.00 in witness fees and $500.00 as a reasonable reimbursement for expenses incurred in the prosecution of this case; (3) that Defendant was not entitled to punitive damages; and (4) that the American rule barred an award of attorney's fees. In denying attorney fees, the lower court relied upon the American rule as explicated in *Alyeska Pipeline Service v. Wilderness Society, supra,* and concluded that such an award on the facts of this cause and in the absence of statutory authorization would not be allowable or appropriate.

On these findings the Court awarded damages to the Plaintiff and against the Union in the total amount of $14,000.00. (App. infra, p. A-10).

Cross appeals to the Sixth Circuit Court of Appeals were taken. Defendant Union, contesting the award of $12,500.00 as compensation for its breach of duty of fair representation, appealed the monetary judgment against it, and Plaintiff appealed the denial of attorney's fees. Holding that $12,500.00 of the trial court's $14,000.00 damage award against the Union rested upon a sheerly speculative foundation and could not stand, and that the trial court improperly interpreted *Alyeska* as barring Plaintiff an award of attorney's fees, the Court of Appeals vacated the District Court's judgment and remanded the case for further proceedings. It directed the trial court on remand to observe Plaintiff's right "to include in his damages against the Union the amount which he reasonably expended in attorney fees and other costs in prosecuting his claim against the Company . . .". (App. Infra, pp. A-3–A-4).

Once again Defendant Union seeks to have this Court review the Appellate Court's holding that a prevailing Plaintiff in a suit for a breach of a Union's duty of fair representation in an action under Section 301 is entitled as a matter of course and right to an award of attorney's fees.

REASONS FOR GRANTING WRIT

I. The Decision Below Conflicts With Controlling Decisions of This Court.

The Appellate Court held (1) that the prevailing plaintiff in a Section 301 action for unfair representation is entitled, under the principles of *Vaca v. Sipes*, 386 U.S. 171 (1967), and *Czosek v. O'Mara*, 397 U.S. 25 (1970), as an integral part of his damages, to an award of attorney's fees; and (2) this court's decision in *Alyeska Pipeline Services v. Wilderness Society*, 421 U.S. 240 (1975), is not pertinent to Section 301 unfair representation suits and, therefore, does not bar an award of attorney's fees to the prevailing plaintiff. These propositions, we shall show, are far-reaching, startling departures from the very holdings of this court relied upon by the lower court to support its conclusions.

A. The Decision Below Is Contrary to the Holdings of This Court in Vaca v. Sipes and Czosek v. O'Mara.

In *Vaca* and *Czosek*, supra, the Court addressed the issue of a union's liability for failing to fairly represent a wrongfully discharged employee where the discharge was occasioned by the employer's wrongdoing alone. Here, the issue is the same. Plaintiff Scott was wrongfully discharged by his employer, and Scott's sole complaint against the union is that the union failed to properly process his grievance protesting his discharge. These are the very circumstances and the same legal issues arising from the circumstances that the court examined in *Vaca*. The Jury in *Vaca* had awarded the wrongfully discharged Plaintiff the sum of $6,500.00 per year as damages against the union for the wrongful discharge, and punitive damages of $3,000.00 for preventing Plaintiff "from completely exhausting administrative remedies." 386 U.S. at 195. These damages, the court held, were not recoverable from the union in the absence of an allegation that the union had affected the discharge. In limiting the union's liability, this court observed:

> "The governing principle, then, is to apportion liability between the employer and the union according to the damage caused by the fault of each. Thus, damages attributable solely to the employer's breach of contract should not be charged to the union, but increases if any in those damages caused by the union's refusal to process the grievance should not be charged to the employer. In this case, even if the union had breached its duty, all or almost all of Owen's [Plaintiff] damages would still be attributable to his allegedly wrongful discharge by Swift [Employer]. For these reasons, even if the Union here had properly been found liable for a breach of duty, it is clear that the damage award was improper." 386 U.S. at 197-198.

In an earlier and contrary opinion to the one below, the Sixth Circuit Court of Appeals, in *St. Clair v. Teamsters Local 515*, 422 F. 2d 128 (6th Cir. 1969), concluded that this court's opinion in *Vaca*, supra:

> ". . . strongly implied that in cases like this, involving a discharge and an alleged failure by the union to take all available steps to remedy the employee's complaint, the increment of damages caused by the union's breach of duty is virtually de minimis." 422 F. 2d at 132

In *Czosek*, supra, again referring to facts paralleling those at bar, the court stated:

> ". . . Assuming a wrongful discharge by the employer independent of any discriminatory conduct by the union and a subsequent discriminatory refusal by the union to process grievances based on the discharge, damages against the union for loss of employment are unrecoverable except to

the extent that its refusal to handle the grievances added to the difficulty and expense of collecting from the employer." 397 U.S. at 29.

Clearly the reliance by the court below on *Czosek* is misplaced. For *Czosek* represents a limitation on a union's liability and not an expansion of it. The plaintiff in *Czosek*, at the District Court level, joined both his employer and his collective bargaining representative as defendants. The Appellate Court dismissed the employer holding that the plaintiff's claims against the employer must be deferred to the Railway Adjustment Board. The union, fearing that, with the employer dismissed from the litigation, the entire recovery would be assessed to the union brought the appeal. This court explained that, although the union was the sole remaining defendant, any judgment against it would be limited to the consequences of its fault.[1]

Here, Plaintiff has recovered from the employer the full amount the Jury assessed as being attributable to his employer's breach of contract. Plaintiff seeks to add to that amount attorney's fees of $34,500.00, an amount almost three times that found to be due by reason of his job loss. Plaintiff's claim to attorney's fees in an amount far exceeding the damages sustained from loss of employment ignores this court's admonition in *Vaca*, supra, that in the circumstances existing here all or almost all of a wrongfully discharged employee's damages are attributable to the employer. Additionally, most of the amount claimed as fees are for the time and effort spent by Plaintiff's attorney in the trial and Appellate Court seeking an award for attorney's fees. These activities are not reflective of Plaintiff's

[1] Attorney's fees are not mentioned by this court in *Czosek*, and there is nothing in the case to even suggest that such relief was sought by plaintiff. To the contrary, in discussing plaintiff's complaint, this court noted, "damages in the sum of $160,000 were sought against the Railroad, the Union defendants or both," 397 U.S. at 26. The decision did not indicate that plaintiff sought attorney's fees.

expenses in collecting damages from his employer and, therefore, are not recoverable from the Union.

The Appellate Court's construction of the damage mandated by *Vaca* and *Czosek*, to be recovered from a union guilty of breaking its obligation to fairly represent a wrongfully discharged employee, appears to be premised on its concern that most of the loss suffered by the employee pursuing an employer in court for damages is the attorney's fees the employee incurs in the pursuit. Attorney's fees, however, is a concern of all litigants, not only wrongfully discharged and unfairly represented employees. The universality of the concern, as *Alyeska*, supra, teaches, does not undermine the American rule or permit the courts to carve out an additional exception to the rule on behalf of litigants whose attorney's fees are the principal element of damage suffered in Court vindication of rights.

Recognition of this principle is shown by the court below when it pointed out, properly, that it would have been inappropriate, under the American rule, to permit Scott to recover attorney's fees from his employer. But the reach of the American rule does not end there. Presumably, the American rule applies to all litigants, whether employer or union representatives. Neither the defendant employer nor the Defendant Union, in a proceeding for damages for loss of employment, may be held accountable for the employee's attorney's fees.

B. The Decision Below, Mandating an Award of Attorney Fees in This Cause, Conflicts With This Court's Holding in Alyeska Pipeline Services v. Wilderness Society.

On remand of this cause Plaintiff sought punitive damages from the Defendant Union on the ground that the union was guilty of bad faith. Plaintiff's bad faith contentions were rejected by the trial court in its refusal to award either punitive

damages or attorney's fees. Further, pointing to the dictates of *Alyeska*, supra, the trial court ruled that it did not have the power in the absence of legislative authorization to grant Plaintiff's request for attorney's fees. The court of appeals disagreed with the trial court's view of *Alyeska* and its holding that Plaintiff may not under the American rule recover attorney's fees. The misreading of *Alyeska* was that by the court of appeals and not by the trial court.

The District Court correctly denied attorney's fees on the authority of *Alyeska*. In *Alyeska*, this court undertook an exhaustive analysis of the role of attorney's fees in federal litigation. This court concluded:

> "In the United States, the prevailing litigant is ordinarily not entitled to collect a reasonable attorneys' fee from the loser. We are asked to fashion a far-reaching exception to this 'American rule'; but having considered its origin and development, we are convinced that it would be inappropriate for the Judiciary, without legislative guidance, to reallocate the burdens of litigation . . ." 421 U.S. at 247

As the trial court correctly noted, the statute upon which Plaintiff relies does not provide for the recovery of attorney's fees. There is no statutory basis for an award of attorney's fees in a case brought under Section 301 of the Labor Management Relations Act. There is no indication in the language of the statute, committee reports or floor debates that Congress desired to authorize the allowance of attorney's fees as a standard remedy in actions instituted under Section 301.[2] The overriding Congressional objective manifested in the legislative history of Section 301, is the desire to make parties to collective bargaining agreements amenable to suit for breach of contract

[2] When Congress desires to fashion such a remedy, it is able to do so by clear and explicit language. See statutes listed in *Alyeska*, 421 U.S. at 260-264, n. 33, 34, 35, 37.

and to provide a forum for such actions. See House Report No. 245 on H.R. 3020, reported at 1 Legislative History of the Labor Management Relations Act, 1947, page 337; Senate Report No. 105 on S. 1126 Id., at 421. See also comments by Senators Taft, Smith and Ball, respectively reported at 2 Legislative History of the Labor Management Relations Act, 1947, pages 1014, 1145, 1146, and 1497.

Certainly there are substantive remedies to be afforded under Section 301, but such remedies are fashioned "from the policy of our national labor laws", and by "looking at the policy of the legislation and fashioning a remedy that will effectuate that policy". *Textile Workers Union v. Lincoln Mills*, 353 U.S. 448, at 456-457 (1957). It was not the legislative intent to specify remedies in Section 301, but to provide a forum in which the relief could be molded by the nature of the problem presented.

Nothing in either the text of Section 301 or its legislative history justifies an automatic allowance of attorney's fees in an action instituted under Section 301. The Act's very silence militates against and precludes a conclusion that the legislation contemplates recovery of counsel fees.

As noted by the trial court, the *Alyeska* analysis and listing of federal statutes authorizing or permitting attorney's fees did not include Section 301. (421 U.S. at n. 33, 34, 35, and 37, pgs. 260-264). Authority for an award of attorney's fees in this case then depends entirely upon whether the cause falls within either of the two narrowly defined exceptions to the American rule there affirmed by the Court. The first exception is where the judgment creates a common fund for a class of beneficiaries and equity directs that the attorney may take his fees from that fund. There is no common fund, no common property, here. There is not even a common benefit. The judgment obtained by Scott is not a judgment which affects all

members of a local immediately and directly by overturning an election or a trusteeship. Rather, this is a suit protesting the discharge without cause of a single person. The second exception is where the defendant has acted in bad faith. There has been no finding of bad faith in this case. Nor is there an allegation, evidence or finding that Defendant Union induced, condoned, or in any way participated in Scott's wrongful discharge. In fact, the trial court reviewed and rejected Plaintiff's contentions of bad faith. Since neither of the exceptions apply, the trial court properly held the American rule requires Plaintiff, and not the Defendant, to bear the cost of Plaintiff's attorney's fees.

II. The Decision Below Creates a Significant Conflict Among the Circuit Courts of Appeals.

Even prior to *Alyeska*, supra, the several courts of appeals, with the exception of the Sixth Circuit, had applied the traditional American rule in Section 301 proceedings. Attorney's fees were permitted only where the trial court, in the exercise of its equity powers and in the circumstance of compelling considerations, found the exceptional circumstances warranting such fees. See the holdings of the Fourth Circuit in *Local Union 149, UAW v. American Brake Shoe Co.*, 298 F 2d 212 (4th Cir. 1962), cert. den. 369 US 873, 82 S Ct 1142 (1963); the Eighth Circuit in *Local 4, IBEW v. Radio Thirteen-Eighty, Inc.*, 469 F 2d 610 (8th Cir. 1972); and the Tenth Circuit in *New Park Mining Company v. United Steelworkers of America, Local 4264*, 288 F 2d 225 (10th Circuit 1961). Cf. *United Steelworkers of America, AFL-CIO v. Butler Mfg. Co.*, 439 F 2d 1110 (8th Cir. 1971); *International Union of District 50, United Mineworkers of America v. Bowman Transportation, Inc.*, 421 F 2d 934 (5th Cir. 1970); *Rolax v. Atlantic Coast Line RR Co.*, 186 F 2d 473 (4th Cir. 1951); *Local 205, United E. R. & M. Wrks. v. General Electric Co.*, 172 F Supp 960

(D. Mass. 1959); *Belo Corp. v. Typographical Union*, 82 LRRM 2574 (DC Tex. 1972), aff'g 471 F 2d 651 (5th Cir. 1973); *Retail Clerks, Local 20 v. Lane County Independent Grocery Employees Committee*, 81 LRRM 2671 (DC Ore. 1972); *Dallas Typographical Union No. 173 v. A. H. Belo Corp.*, 372 F 2d 577 (5th Cir. 1967); *IBEW, Local 494 v. Artkraft, Inc.*, 86 LRRM 3111 (ED Wisc. 1974); See also: *Thomas v. Honeybrook Mines, Inc.*, 74 LRRM 2337 (3rd Cir. 1970), den. rehear'g and modif'g 428 F 2d 981.

Subsequent to the *Alyeska* decision, the Fourth and Eighth circuit courts of appeals have again considered the propriety of an award of attorney's fees to a successful plaintiff in an unfair representation case. *Harrison v. United Transportation Union*, 530 F 2d 558 (4th Cir. 1975), cert. den. 96 S Ct 1739 (1976); and *Richardson v. Communication Workers of America*, 530 F 2d 126 (8th Cir. 1976). In both cases, the respective courts concluded, contrary to the court below, that the propriety of such an award must be determined within the framework of *Alyeska*. It is true that in each case the trial court's award for attorney's fees was upheld, but both Circuit courts pointedly grounded the affirmance of the award on an *Alyeska* recognized exception.

Thus, in *Richardson*, supra, a discharged employee brought an action against the employer, his international union and local union, alleging wrongful discharge. Plaintiff in that action, as Plaintiff Scott, requested an award of attorney's fees. The court, in concluding that the specific exception of bad faith applied, ruled:

> "In *Alyeska Pipeline Service Co. v. Wilderness Society*, 421 U.S. 240, 95 S.Ct. 1612, 44 L.Ed.2d 141 (1975), the Supreme Court recognized certain exceptions to the 'American rule' that attorney fees are not ordinarily recoverable by the prevailing party in federal litigation absent

statutory authorization. These include 'when the losing party has "acted in bad faith, vexatiously, wantonly, or for oppressive reasons."' *Id.* at 258-59, 95 S.Ct. at 1622, *quoting from F.D. Rich Co. v. United States ex rel. Indus. Lumber Co.*, 417 U.S. 116, 129, 94 S.Ct. 2157, 40 L.Ed. 2d 703 (1974). See *Doe v. Poelker*, 515 F.2d 541, 547 (8th Cir. 1975).

* * * * * * * *

"We conclude from our examination of the record that there is ample support for a finding of bad faith on the part of the Unions in not only failing to represent plaintiff in his grievance but in actually inducing his wrongful discharge. We agree that this is a proper case for an award of attorney fees on Count I because the Unions' bad faith comes within the bad faith exception noted in *Alyeska. Accord, Doe v. Poelker, supra*, 515 F.2d at 547-49." 530 F. 2d at 132, 133

Similarly, in *Harrison*, supra, the court granted an award of attorney's fees in an unfair representation action. However, again, the court was careful to predicate the award on a specifice exception to the general rule. In so holding, the court cited *Hall v. Cole*, 412 U.S. 1 (1973), as precedential support for the conclusion that the Plaintiff was entitled to attorney's fees on the basis of the common benefit exception to the American rule. Neither Court held that *Alyeska* was inapplicable nor that an aggrieved union member in an unfair representation case is entitled to attorney's fees as part of his damages.

The conflicting view of the Appellate Court below is the first and only holding by a Circuit Court of Appeals that attorney's fees are mandated and are recoverable from a Defendant Union as an integral part of the damage suffered by a successful Section 301 litigant.[3] The conflict reflected in the decisions of the several courts of appeals has not been addressed by this court. The issue is involved in every Section 301 proceeding. It can be authoritatively resolved by this court only.

CONCLUSION

For the foregoing reasons, a writ of certiorari should issue to review the judgment and opinion of the Sixth Circuit Court of Appeals.

Respectfully submitted,

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[3] In Section 301 actions which are not predicated upon a claim of unfair representation, but which were decided subsequent to this court's opinion in *Alyeska*, courts have uniformly recognized the applicability of *Alyeska. International Brotherhood of Electrical Workers v. A-1 Electrical Service, Inc.*, 535 F 2d 1 (10th Cir. 1976); *General Drivers, etc. v. Sears Roebuck and Company*, 535 F 2d 1072 (8th Cir. 1976), and *IAM v. Sargent Industries*, 522 F 2d 280 (6th Cir. 1975). See also: *Meat and Allied Food Workers Local No. 248 v. Packerland Packing Company, Inc.*, 411 F Supp 1280 (Wis. 1976); *Kellogg Company v. International Printing Pressmen and Associates Union of North America*, 410 F Supp 207 (Mich. 1976); *International Union, UAW v. Caldwell Manufacturing Company*, 416 F Supp 1267 (Kan. 1976).

APPENDIX

COURT OF APPEALS OPINION

No. 75-2317
No. 75-2318

United States Court of Appeals
For the Sixth Circuit

William Scott,
Plaintiff-Appellant,
v.
Local Union 377, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America,
Defendant-Appellee.

Appeal from the United States District Court for the Northern District of Ohio, Eastern Division

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Decided and Filed January 26, 1977

Before: McCree, Lively and Engel, Circuit Judges.

Per Curiam. The principal issue on this appeal is whether the decision of the United States Supreme Court in *Alyeska Pipeline Services Co. v. Wilderness Society*, 421 U.S. 240 (1975) affects in any way the inclusion of attorney fees as an element of damage in a suit for breach of a union's duty of fair representation under § 301 of the Labor Management Relations Act, 29 U.S.C. § 185. We hold it does not.

Scott's dispute with the Union and his employer, Anchor Motor Freight, is fully set forth in our earlier decision in *Scott*

v. Anchor Motor Freight, Inc., 496 F.2d 276 (6th Cir. 1974). In a § 301 suit against Anchor and Local 377, Scott had obtained a jury verdict upon his claim that Anchor had wrongfully discharged him and that the Union had unfairly represented him in protesting that discharge. The original jury verdict assessed damages of $12,500 against Anchor and a like and separate amount against Local 377. In the first appeal we affirmed the jury's finding of liability against both defendants and the award as against Anchor. However, we vacated the award against the Union because of our conclusion that "the $12,500 verdict . . . necessarily rests on a sheerly speculative foundation and cannot stand." The verdict was speculative because plaintiff was precluded from introducing evidence before the jury of reasonable attorney fees incurred by him in the prosecution of his case. Accordingly, the judgment against the Union was vacated and the case remanded to the district court "for a comprehensive determination of damages incurred by Scott as a result of the Union's breach of its duty of fair representation, under the principles of *Vaca v. Sipes*, 386 U.S. 196, 198." *Scott v. Anchor Motor Freight, Inc., supra*, 496 F.2d at 282.

Upon remand, the parties waived a jury trial and the court reopened proofs for the limited purpose of the remand, it being agreed, however, that the court might also consider the record of the earlier trial.

The district court in its opinion on remand declined to award punitive damages finding them inappropriate under the circumstances. The court then awarded the plaintiff $1,000 to reimburse him for the services of an expert witness and an additional $500 for certain out-of-pocket expenses incurred in the prosecution of the action. We find both determinations well within the range of the proofs and do not disturb them.

It is the balance of the opinion, however, which causes us concern. Without stating its reasoning, the district court held simply:

> Upon consideration of the evidence in this case, the court finds that the sum of $12,500 is a reasonable and just figure to compensate plaintiff for the breach of Local No. 377's duty of their representation.

No explanation of what is represented by this award is found in the opinion. It is clear from the court's opinion that the award is not for attorney fees, for the court thereafter expressly determined that it was precluded from any award for attorney fees by *Alyeska Pipeline Services Co. v. Wilderness Society, supra*. Citing the *Alyeska* decision as authority, the trial court felt that it was not permitted to award attorney fees in this case "without legislative guidance. This court, therefore, determines that plaintiff's request for attorney fees must be denied." We cannot agree.

The Supreme Court in *Alyeska* reaffirmed the traditional American rule that attorney fees are not ordinarily recoverable by the prevailing litigant in federal litigation in the absence of statutory authorization. We do not read the decision as in any way affecting those cases in which the attorney fees are not an award to the successful litigant in the case at hand, but rather are the subject of the law suit itself. More particularly, we do not understand that the decision in *Alyeska* in any way affects the measure of damages which can be awarded to a prevailing plaintiff in a suit for a breach of a union's duty of fair representation in an action under § 301. While *Alyeska* had not been decided prior to our first opinion, we implicitly recognized its holding by our agreement with the district court that an award of attorney fees against the employer would be improper, See *Scott v. Anchor Motor Freight, Inc., supra*, 496 F.2d at 281-282. To have awarded Scott his attorney fees against Anchor Motor Freight would have been in violation of the American rule as set forth in *Alyeska*. A different situation is presented, however, in his action against the Union, for in that action the principal element of Scott's damages is the amount which it cost him in attorney fees and other expenses to do that which the

union was obliged but failed to do on his behalf. He was, therefore, entitled to include in his damages against the Union the amount which he reasonably expended in attorney fees and other costs in prosecuting his claim against the company, costs which he would not have incurred but for the Union's breach of its duty to represent him fairly and in good faith. *Czosek v. O'Mara*, 397 U.S. 25, 29 (1970); See also, *Harrison v. United Transportation Union*, 530 F.2d 558, 562, (4th Cir. 1975), *cert. denied* 96 S. Ct. 1739 (1976); *De Arroyo v. Sindicato de Trabajadores Packinghouse*, 425 F.2d 281, 293 n. 17 (1st Cir. 1970).

While the trial court had evidence before it from which to make such a determination, it failed to make any such determination, believing it was precluded from doing so by *Alyeska*. This requires remand.

Finally, we must again vacate the district court's award of $12,500. Because the district court failed to specify what elements of damage, if any, were otherwise included within that figure, we must again hold that the determination "rests upon a sheerly speculative foundation and cannot stand," at least in the absence of any explanation. While we conceive that *Vaca v. Sipes* leaves open the question of what additional damages besides attorney fees might be shown to have been caused by a union's breach of its duty of fair representation, we are unable, upon the proofs before us, to determine what other elements of damages could justify such an award. See particularly, *St. Clair v. Teamster Local No. 515*, 422 F.2d 128, 132.

Accordingly, the judgment of the district court is vacated and the case remanded for further proceedings. On remand, the district court should clearly state its findings of fact and assessment of damages in accordance with the apportionment required in *Vaca v. Sipes*, 386 U.S. 171 (1967) and *Czosek v. O'Mara*, 397 U.S. 225 (1970).

DISTRICT COURT JUDGMENT

Contie, J.
(G)

(Filed June 30, 1975)

United States District Court
Northern District of Ohio
Eastern Division

William Scott, Plaintiff, v. Anchor Motor Freight, Inc., et al., Defendants.	Civil Action C 68-252 Y

MEMORANDUM OPINION AND ORDER

The above captioned cause of action is before this Court pursuant to the decision of the United States Circuit Court of Appeals for the Sixth Circuit, *Scott v. Anchor Motor Freight*, 496 F.2d 276 (C.A.6 1974), wherein said court determined that "the Order [of the District Court] is reversed, and the cause is remanded to the District Court with instruction that the amount of damages properly attributable to the breach of Local No. 377's duty of fair representation be assessed." Pursuant to this Order the Court held a trial do novo on May 2, 1975 to determine the damages attributable to the remaining defendant in the above captioned cause of action. The parties agreed to waive the jury and try the matter to the Court. This cause came on for trial on May 2, 1975, at which time this Court heard testimony and received evidence. The following shall constitute this Court's findings of fact and con-

clusions of law pursuant to Rule 52(a) of the Federal Rules of Civil Procedure.

Plaintiff in this case presents a claim for compensatory and punitive damages, attorneys' fees and expenses. Upon consideration and for the reasons stated below this Court shall award plaintiff compensatory damages and certain expenses and shall deny plaintiff's remaining requests for expenses, punitive damages, and attorney's fees.

The initial trial of this cause was presented to a jury which returned a verdict against defendant Local 377 in the amount of $12,500.00. Upon reversal the Sixth Circuit noted that said figure "must necessarily represent the jury's findings as to the extent that said defendant's conduct in refusing to handle plaintiff's grievance added to the difficulty and expense of collecting from defendant Anchor Motor Freight," *Scott*, supra, at 281. However, the Sixth Circuit indicated that because of the jury instruction which could have been interpreted as including attorney's fees and expenses and because of the failure of the plaintiff to present any evidence in regards to attorney's fees pursuant to a ruling by this Court, the $12,500.00 verdict against the Union necessarily rested upon speculation.

The Court has before it no factual issue in regards to liability, liability having been found by the jury in the original trial. The Court has before it the affidavit and testimony of counsel for plaintiff in regards to expenses, costs and fees, and the stipulation of the parties as to the admissibility of certain exhibits. Upon consideration of the evidence in this case, the Court finds that the sum of $12,500.00 is a reasonable and just figure to compensate plaintiff for "the breach of Local 377's duty of their representation."

The Court next turns to the issue of punitive damages. Plaintiff requests that this Court award $25,000.00 because of the bad faith of Union in the instant action. Upon consideration of

all the facts brought out at the original trial of this case and the briefs of the parties, this Court is of the opinion that an award of punitive damages in the instant case would be inappropriate. In the case of ***Butler v. Yellow Freight Systems Inc.***, 374 F. Supp. 747 (1974), the court therein stated:

> "Punitive or exemplary damages, by their very nature, constitute an extraordinary form of relief which will be inappropriate and unwarranted in most labor cases."

Further, in the absence of a statute specifically permitting an award of punitive damages, whether such damages are recoverable rests in the discretion of the jury, or the trial court sitting without a jury. 25 C.J.S. *Damages* § 117(2). See also *Precision Plating and Metal Finishing, Inc. v. Martin Marietta Corp.*, 435 F.2d 1262, reh. den. 442 F.2d 1351 (C.A.5 1970).

The Court therefore, upon review of the facts of this case and in its discretion, hereby denies plaintiff's request for punitive damages.

The Court next turns to plaintiff's claim for expenses. Attorney Tobias took the stand at the trial on May 2, 1975 and testified in regards to the expenses he incurred in the within litigation. On cross-examination Attorney Tobias was questioned in regards to the charges he delineated as expenses for the Scott case. It was brought out that included in plaintiff's demand for expenses was the payment of six doctors, only one of which testified at trial. The payment of two of said doctors was for interviews between Attorney Tobias and a doctor whose specialty was in diabetes so that Attorney Tobias would have sufficient knowledge to question witnesses at trial.

It was further brought out that Attorney Tobias was at that time prosecuting three cases before the District Court in the Northern District of Ohio and that the expenses charged for telephone calls and trips to Cleveland may well have represented

time spent by Attorney Tobias on any of these cases. Attorney Tobias did not keep detailed records concerning his time until the year 1972. From the initiation of this cause of action up to that point Attorney Tobias has no firm records but has indicated hours and time spent as well as phone calls made to Cleveland on the basis of his best recollection and with an effort to be fair in his estimates.

Also included in plaintiff's requests for expenses are the costs of travel, room and board in Cleveland during trial, and expenses incurred in the prosecution of the appeal of the within matter.

This Court is of the opinion that expenses incurred for the education of plaintiff's counsel in the medical field of diabetes is an improper expense and is not chargeable in the instant case. Further this Court finds the retention of six doctors for the purpose of this case to be unreasonable. The Court finds the figure of $1,000.00 to be a reasonable figure to be paid for the services of an expert witness.

This Court further finds that a reasonable figure for out of pocket expenses including long distance telephone calls and photostats during the prosecution of the instant action to be $500.00. Expenses regarding travel, room and board are found to be inappropriate and the Court finds that no award shall be made for said expenses.

Plaintiff's attorney has further indicated that he feels that he has a moral obligation to pay certain other counsel retained for the purpose of being local counsel, which arrangements did not work out. This Court finds there is no basis to award the attorney for plaintiff expenses for what he feels to be moral obligations.

Upon consideration, this Court determines the total sum of $500.00 to be a reasonable reimbursement to the attorney for

plaintiff for his expenses incurred in the prosecution of the above captioned cause of action.

The Court finally turns to plaintiff's request for attorney's fees. Plaintiff has requested the amount of $34,350.00 for his services. The Court finds that the case of *Alyeska Pipelines Services Co. v. Wilderness Society*, — U.S. —, 95 S.Ct. 1612, — L.Ed.2d — (1975) is controlling as to this issue. In that case, the United States Supreme Court determined that awards of attorney's fees should not be made in cases prosecuted pursuant to the "private attorney general" theory. The Court, after an in-depth review of the English and American rules, determined that awards of attorney's fees should not be made by courts unless there is statutory authorization for such an award. The court stated:

> "In the United States, the prevailing litigant is ordinarily not entitled to collect a reasonable attorney's fee from the loser. We are asked to fashion a far-reaching exception to this 'American Rule'; but having considered its origin and development, we are convinced that *it would be inappropriate for the Judiciary, without legislative guidance, to reallocate the burdens of litigation* in the manner and to the extent urged by respondents and approved by the Court of Appeals." (Emphasis supplied.)

In the *Alyeska* decision, the Supreme Court referred to federal statutes which allowed an award of attorney's fees as a matter of judicial discretion. The Court therein did not include Section 301 cases. [Title 29 U.S.C. Section 185]. This Court feels compelled to follow the dictates of the United States Supreme Court and interprets the *Alyeska* decision as not permitting this Court to award attorney's fees without legislative guidance. This Court therefore determines that plaintiff's request for attorney's fees must be denied.

For the above mentioned reasons this Court hereby awards damages to the plaintiff and against defendant Local 377 in the total amount of $14,000.00.

It Is So Ordered.

/s/ LEROY J. CONTIE, JR.
U. S. District Judge

STATUTE INVOLVED

(Filed June 30, 1975)

LIABILITIES OF AND RESTRICTIONS ON LABOR AND MANAGEMENT

185. Suits by and against labor organizations.—(a) Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this Act [§§ 141-144, 151-158, 159-168, 171-182, 185-187 of this title], or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties.

(b) Any labor organization which represents employees in an industry affecting commerce as defined in this Act [§§ 141-144, 151-158, 159-168, 171-182, 185-187 of this title] and any employer whose activities affect commerce as defined in this Act [§§ 141-144, 151-158, 159-168, 171-182, 185-187 of this title] shall be bound by the acts of its agents. Any such labor organization may sue or be sued as an entity and in behalf of the employees whom it represents in the courts of the United States. Any money judgment against a labor organization in a district court of the United States shall be enforceable only against the organization as an entity and against its assets, and shall not be enforceable against any individual member or his assets.

(c) For the purposes of actions and proceedings by or against labor organizations in the district courts of the United States, district courts shall be deemed to have jurisdiction of a labor organization (1) in the district in which such organization main-

tains its principal office, or (2) in any district in which its duly authorized officers or agents are engaged in representing or acting for employee members.

(d) The service of summons, subpoena, or other legal process of any court of the United States upon an officer or agent of a labor organization, in his capacity as such shall constitute service upon the labor organization.

(e) For the purposes of this section, in determining whether any person is acting as an "agent" of another person so as to make such other person responsible for his acts, the question of whether the specific acts performed were actually authorized or subsequently ratified shall not be controlling. (June 23, 1947, c. 120, Title III, § 301, 61 Stat. 156.)